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1 (The following was heard in open court at
2 9:15 a.m.)

3 THE COURT: Good morning. Please be seated.

4 ALL: Good morning, Your Honor.

5 THE COURT: We are here today to consider the
6 relief to be granted to the defendant, Mr. Cobb, after
7 the Court granted his 2255 petition. Mr. Cobb was
8 initially sentenced to 288 months of incarceration, and
9 the question is what is the appropriate sentence at
10 this point.

11 So, why don't we start with you, Ms.
12 Cinquanto, what do you think?

13 MS. CINQUANTO: Well, Your Honor, I believe
14 that we have to have a two-prong approach to this
15 situation. First I believe that Your Honor must decide
16 whether or not -- the defense position is that Mr. Cobb
17 should be able to plead open in the -- the sentence and
18 the conviction should be vacated, and he should be able
19 to plead open in the same position that he would have
20 been in May of 2010, and that position, Your Honor,
21 would have been prior to the 851 being filed and prior
22 to trial.

23 So, I think the first step here is that Your
24 Honor must decide whether or not the defense argument
25 is valid, and whether or not the 851 should also be

1 vacated and also Mr. Cobb should be sentenced on one
2 kilo versus two kilos.

3 After that decision is made, which could be
4 made today, Your Honor, then I believe we should
5 adjourn and we should come back for sentencing in about
6 60 days because then a new PSR can be created, if that
7 is necessary, and also Mr. Cobb can then present his
8 post-sentencing rehabilitation arguments, which he is
9 allowed to present, under Pepper versus United States.
10 So, that is my request today.

11 THE COURT: I guess in either event, maybe we
12 should do that. In other words, even if I disagree
13 with you that 851 would not have been filed, maybe we
14 should have an update of the PSI to see whether there
15 has been any post-rehabilitation.

16 But, I don't know if that would require a
17 full sentence or simply to take -- as it was mentioned
18 in Lafler that we could just take into account any
19 other information, but I don't know. You say he is
20 entitled to a full sentencing hearing?

21 MS. CINQUANTO: Well, Your Honor, I believe
22 that at the very minimum we are entitled to present the
23 post-rehabilitation information --

24 THE COURT: Right.

25 MS. CINQUANTO: -- which in this situation is

1 substantial.

2 THE COURT: Okay.

3 MS. CINQUANTO: I was only able to get
4 approximately, you know, ten certificates of programs
5 that Mr. Cobb has either taught or Mr. Cobb has taken.
6 His counselor at the prison has said that she is happy
7 to release his disciplinary record and his other
8 certificates which, I believe, are very, very good.

9 THE COURT: Well, why weren't you ready with
10 that today? Today is the hearing.

11 MS. CINQUANTO: Today is the day of the
12 hearing, Your Honor, however, she would only release
13 that to the government. And my apologies, Your Honor,
14 I was not made aware of that in enough time for the
15 government to actually jump through those hoops. That
16 is my responsibility.

17 THE COURT: Okay. So, you want to have some
18 more educational certificates that Mr. Cobb has earned,
19 is that it?

20 MS. CINQUANTO: Yes, Your Honor. And this
21 just isn't a defendant who I'll give you one or two
22 extra certificates. This is significant and
23 substantial.

24 THE COURT: Okay. And what else?

25 MS. CINQUANTO: That's it, Your Honor. So, I

1 would like the opportunity to be able to argue because
2 I believe at sentencing -- see, I think at sentencing
3 we're going to have -- if this is not a situation where
4 Your Honor is going to be considering an upward
5 variance like the government has requested, and a
6 significant upward variance at that, perhaps we could
7 go forward on the paperwork.

8 But, I do believe that because the government
9 is going to be asking for an upward variance, I believe
10 they said something of 78 percent of his sentence --

11 THE COURT: Right.

12 MS. CINQUANTO: -- then I do think it is
13 important to Mr. Cobb --

14 THE COURT: Well, I think we're talking about
15 the trees, maybe the forest here first. What is the
16 Court charged with doing at this hearing? What would
17 be just and fair? What is the question that I have to
18 ask myself?

19 MS. CINQUANTO: I think there is two
20 questions, Your Honor. The first question is whether
21 or not Mr. Cobb should be sentenced based on a
22 guideline range of one kilo of cocaine that he
23 possessed, or two kilos of cocaine which is the
24 information that came out during the trial, which would
25 never have come out before Your Honor had he pled open

1 back in May of 2010.

2 Second, Your Honor, I believe, and more
3 importantly I believe that we do have to discuss the
4 851 enhancement --

5 THE COURT: Right.

6 MS. CINQUANTO: -- because the 851 is a
7 significant enhancement, and I am prepared to argue
8 that today. The one kilo versus two kilos, my argument
9 will be brief, but I do believe the 851 must be decided
10 today. Then, once we decide that, we can come up with
11 an appropriate guideline range and then we can go to
12 sentencing.

13 THE COURT: Okay. Now, what about 851? How
14 does 851 work?

15 MS. CINQUANTO: Okay. Your Honor, this is
16 what happened in this case and the timing is very, very
17 important. Mr. Cobb is indicted in November of 2009.
18 He is facing at that point a five-year mandatory
19 minimum.

20 On May 24th, 2010 the government files an
21 851, and what that means is that it went from a
22 five-year mandatory minimum to a ten-year mandatory
23 minimum. Less than --

24 THE COURT: Now, I was looking at 851. How
25 do you get from five to ten?

1 MS. CINQUANTO: I get from five to ten
2 because he has a prior conviction for a drug
3 distribution.

4 THE COURT: But, is that under -- 851 itself
5 doesn't say anything about it, I guess. Do you then go
6 to the drug -- 843 or 841?

7 MS. CINQUANTO: 841, Your Honor, and I have
8 that in front of me if Your Honor would like to see
9 that.

10 THE COURT: Okay. Give me a citation to
11 that.

12 MS. CINQUANTO: Yes, Your Honor. That would
13 be 840 -- bear with me here, sir, 841(b)(1)(B), Your
14 Honor.

15 THE COURT: Okay. So, you start with an 851
16 notice and then you go to the statute that governs that
17 crime, in this case it's 841(b)(1)(B), and that takes
18 you from five to ten years. So, you would give him 120
19 months baseline.

20 MS. CINQUANTO: That is correct. And what is
21 very important here is that you have to think about the
22 timing. As I said, he's indicted in November of 2009.
23 The 851 is dropped on May 24th, 2010 --

24 THE COURT: Right.

25 MS. CINQUANTO: -- and then on June 17th,

1 three weeks later this man goes to trial. So, the
2 timing is important.

3 THE COURT: Why is that? What do you make
4 out of the timing, what does that tell you?

5 MS. CINQUANTO: The timing, Your Honor, and,
6 number one, I am going to argue common sense. I'm
7 going to argue your experience, I am going to argue my
8 experience, I'm going to argue the U.S. Attorney's
9 experience.

10 My experience is in practicing in Federal
11 Court for almost ten years, is that 851s are not filed
12 unless the defendant opts to go to trial. And, for
13 example, I'm going to do a change of plea hearing this
14 afternoon and one of the things that the government had
15 talked about is if he decided to go to trial, then an
16 851 would be filed, and that is something that is part
17 of the plea negotiations.

18 Now, in this case, Your Honor, the government
19 claims that it would have filed the 851, it was going
20 to file it as early as the detention hearing. Your
21 Honor, I just don't believe that's believable. I take
22 your experience, my experience and the U.S. Attorney's
23 experience --

24 THE COURT: Yes. But, the judge, in my
25 experience and, again, this is one of the questions

1 here since we don't have much guidance, and it seems to
2 me that it may not be a good way to looking at it, but
3 in my experience I would look at the plea and would see
4 whether the plea reflected the reality of the crime,
5 and I have rejected a number of pleas that do not
6 reflect the reality of the crime.

7 If 851 was warranted in this case, why
8 wouldn't it have been filed?

9 MS. CINQUANTO: Your Honor, first of all,
10 Your Honor, with all due respect, Your Honor has no
11 input whether or not an 851 is filed.

12 THE COURT: Right, but I have an input
13 whether or not I accept a plea.

14 MS. CINQUANTO: Well, if he pled open, Your
15 Honor, I believe that Your Honor would have no choice
16 but to accept the plea if he had pled open to all of
17 the charges.

18 Your Honor at that point would have the
19 opportunity to give him an upward variance, which is
20 what Your Honor decided to do, and that is within Your
21 Honor's discretion.

22 But, when he comes before you in May of 2010
23 with a five-year mandatory minimum, which is a 60-month
24 mandatory minimum and the guideline range, at that
25 point, Your Honor, if he pleads open to everything, I

1 believe that Your Honor at that point, if he gets to
2 the plea colloquy, must accept his plea.

3 At that point, Your Honor, the PSR will be
4 prepared, Your Honor would see what the guidelines are,
5 and Your Honor might say hey, you know what, this is
6 not satisfactory to me, I want to do an upward
7 variance. That is how that process works.

8 The 851 process is something that is the sole
9 discretion of the U.S. Attorney's Office, and that in
10 my experience has been used as a plea tactic, as a
11 negotiation tactic. And if you look at the timing
12 here, three weeks before trial, three weeks before
13 trial is when they opt to file the 851.

14 We know from the hearing that we had, that
15 that's when they were going through the negotiations as
16 to whether or not he was going to be pleading, and they
17 were trying to get the cooperation plea agreement and
18 that type of thing was working.

19 Now, Your Honor, the second thing is, besides
20 our common experience in this particular area, we also
21 have to think about the practice of the U.S. Attorney's
22 Office.

23 Since this case has happened, General Holder
24 has announced, and I've got his memorandum right here,
25 that 851s are not to be filed willy-nilly. They are

1 not to be filed in a detention hearing unless there is
2 really a good reason. They are not even supposed to be
3 used as a plea tactic or a negotiation tactic anymore.

4 General Holder has made it very clear in his
5 memo that that is not to happen. So, Your Honor, not
6 only do we have our common experience, but we've also
7 got guidance now from General Holder as to whether or
8 not 851s should and could be filed.

9 Finally, Your Honor, and this is something
10 that we have to, you know, think about, there is a
11 thing called the Smarter Sentencing Act, that is before
12 Congress, has not passed, has not passed, but is before
13 Congress right now. It's a bipartisan effort to reduce
14 the mandatory minimums.

15 So, now we're talking about something that
16 used to be a five-year mando is going to be, hopefully,
17 a two-year mando. Something that was a ten-year mando
18 is going to be a five-year mando.

19 So, in this particular case, if the Smarter
20 Sentencing Act is in place at the time that he is
21 sentenced, which is unlikely, but I am using this as
22 guidance for the Court as to what the rest of the world
23 thinks is common sense, the sentence he would be
24 looking at for the amount of drugs that he possessed
25 would have been a two-year mando. Even if the

1 government drops the 851, it would only go to a
2 five-year mando.

3 So, Your Honor, everything is pointing
4 towards the fact that this man should not have an 851
5 dropped on him because we've got Congress looking at
6 reducing it from a ten-year down to a five-year, we
7 have got General Holder saying don't drop these 851s
8 willy-nilly, and we've got the timing and the common
9 sense of the Court to show that this is not something
10 that would have been filed had Mr. Cobb not opted to go
11 to trial.

12 So, Your Honor, all things are pointing to --
13 the 851 should have never been filed, and it wouldn't
14 have been filed had he been given the proper advice at
15 the time that he wanted to plead open or could have
16 pled open back in May of 2010.

17 Just to show Your Honor, if I could, I
18 prepared a little cheat sheet. May I?

19 THE COURT: Please.

20 MS. CINQUANTO: May I approach?

21 (No response heard.)

22 MS. CINQUANTO: Your Honor, this makes it
23 very clear as to what we're looking at here. The top
24 chart shows that if you sentence Mr. Cobb, and let's
25 just say you sentence Mr. Cobb on the two kilos of

1 cocaine that the PSR allocated in the guidelines, his
2 guideline range would be 84 to 105 months, okay, and
3 that takes into account the amount of drugs which is
4 28, the guideline level 28, the now applicable of the
5 2014 Fair Sentencing Act, which is a two level
6 reduction which the government does not disagree should
7 be imposed in this case, and also three levels off for
8 a timely plea.

9 So, Mr. Cobb at this point would have been at
10 a level 23, and his guideline range would have been 84
11 to 105 months. Now, if the government says that the
12 851 should be filed, if we look at the second chart, I
13 say pre-SSA, that's pre-Smarter Sentencing Act, that's
14 the sentencing act I just talked about, then his
15 minimum guideline range would go from 105, Your Honor,
16 to 120 months. That is a 15-month increase over the
17 guideline limit.

18 So, when the government tries to say oh, the
19 851 doesn't really matter in this case, the 851 very
20 much matters in this case, because if the 851 is not
21 filed, Mr. Cobb is only looking at a guideline range of
22 84 to 105 months, and from there is where Your Honor
23 would do his departure. So, whether the 851 is filed
24 in this case is very important.

25 If you look at the second line --

1 THE COURT: Well, the difference is 105 as
2 opposed to 120, right?

3 MS. CINQUANTO: That's correct, Your Honor --

4 THE COURT: Okay.

5 MS. CINQUANTO: -- but that is a significant
6 difference. Now, if Your Honor takes a look at the
7 second line there where I say post-SSA and, again, I am
8 not trying to insinuate that this actually has been
9 passed, it has not. It's a resolution that's before
10 Congress, I believe it's a bipartisan effort and I
11 believe because it's bipartisan it will be passed, that
12 he would only be looking at a 60-month mandatory
13 minimum even if they dropped the 851.

14 So, basically what we are looking at here
15 is -- he would be looking at -- once the post-Smarter
16 Sentencing Act, he wouldn't even be looking at 120
17 months, Your Honor, he would only be looking at 60
18 months mandatory minimum.

19 Your Honor, all --

20 THE COURT: But, the sentencing guideline
21 would still be 105 months, right?

22 MS. CINQUANTO: That is absolutely correct,
23 Your Honor.

24 THE COURT: Yes.

25 MS. CINQUANTO: And Your Honor would have

1 discretion. Well, what they ask is that -- okay, I am
2 going to disregard that.

3 Yes, Your Honor, and in 105 months, Your
4 Honor, then we would be able to come back before Your
5 Honor at sentencing, and I would be able to argue for a
6 downward variance based upon post-rehabilitation under
7 Pepper, and the government would be able to argue for
8 an upward variance and then Your Honor would have
9 discretion on whatever Your Honor wants to do.

10 THE COURT: Well, then it would seem to me
11 that what you're suggesting -- and you would have one,
12 two, three various steps, so let me try to collapse
13 them into perhaps two.

14 Number one is what is the baseline? And the
15 baseline depends upon whether 851 is applicable. Once
16 that is determined, then we would see whether the 78
17 percent increase from the baseline should be done in
18 this case, whether it's consistent with the sentence.
19 That would be step number one.

20 And then once we get that figure, we will go
21 to step number two, and step number two would be
22 whether or not that figure should be modified upward or
23 downward by the conduct of the defendant since he was
24 sentenced or any other factor that may be -- may be
25 applicable.

1 MS. CINQUANTO: Well, may I?

2 THE COURT: Yes.

3 MS. CINQUANTO: Okay. I do believe that
4 the first issue before Your Honor is the 851, whether
5 or not Your Honor believes that in May of 2010, would
6 that really have been filed?

7 THE COURT: Right.

8 MS. CINQUANTO: Okay. Now, my argument is
9 we're at 184 to --

10 THE COURT: No, I heard your arguments. Yes.

11 MS. CINQUANTO: Fair enough, sir.

12 THE COURT: Okay.

13 MS. CINQUANTO: I didn't --

14 THE COURT: So that would be step number one.
15 And then number two would be what is the extent of the
16 variance. If you take the same percentage variance or
17 the number of months, that would give you the tentative
18 sentence in this case to which you then have an
19 opportunity to argue that it should be modified by
20 events that have occurred since he was sentenced.

21 MS. CINQUANTO: Well, may I, Your Honor?

22 THE COURT: Yes.

23 MS. CINQUANTO: I think the --

24 THE COURT: What's missing there?

25 MS. CINQUANTO: I think the 78 percent, Your

1 Honor, is the -- you are automatically assuming that
2 you would be imposing a 78 percent increase I believe
3 is something that should be reconsidered.

4 THE COURT: Okay.

5 MS. CINQUANTO: And let me tell you why.
6 Because, Your Honor, in your wisdom, in your wisdom, in
7 your own brief, your opinion, you said that there's
8 a -- you increased -- it was an upward variance of 78
9 percent based upon a lot of things, one of them being
10 that you had -- this gentleman had gone to trial.

11 THE COURT: Right.

12 MS. CINQUANTO: One of them all the
13 information that you heard during trial. I mean there
14 was -- there was an opinion that you got of this
15 particular gentleman because of all the things that
16 happened post-May 2010, things that you would not have
17 known necessarily or thought about him had he pled
18 guilty back in May of 2010.

19 Now, I know I can't un-ring a bell for you,
20 sir, but I --

21 THE COURT: So but you think that as a legal
22 principle, all that disappears?

23 MS. CINQUANTO: No, Your Honor, I don't. And
24 I'm not -- and I'm not -- if I didn't think that Your
25 Honor could --

1 THE COURT: Well, let's assume we had a
2 motion to suppress and we have learned certain
3 information and he had pled guilty at that point --

4 MS. CINQUANTO: Sure.

5 THE COURT: -- would the information that I
6 learned from the motion to suppress would not be
7 relevant at sentencing?

8 MS. CINQUANTO: No, Your Honor, I believe it
9 would be relevant at sentencing. And the reason why
10 I've -- but I don't think that automatically Your Honor
11 should say okay, I'm going to go with the 78 percent
12 because I think --

13 THE COURT: Well, so let me give you this
14 hypothetical. I think one of the reasons why I granted
15 the variance was that in my view Mr. Cobbs culpability
16 was close to that of his brother or equal to that of
17 his brother, and his brother had been sentenced to 288
18 months. Now, would it be possible to say that since
19 the baseline is lower now, the variance should be
20 greater?

21 MS. CINQUANTO: Your Honor, I actually -- I
22 disagree wholeheartedly, respectfully, Your Honor.
23 First of all, Your Honor, you have to think about where
24 you would have been, sir, prior to trial, prior to the
25 ineffective assistance of counsel.

1 There wasn't a suppression hearing, you know,
2 in May of 2010. Where would your mind set have been,
3 Your Honor? Your mind set would have been that we have
4 a gentleman coming in pleading open before Your Honor,
5 okay, who's not known as -- you know, you're a pretty
6 conservative sentencer, all right, coming in doing the
7 right thing, coming in before Your Honor. You would
8 not have heard all of the things that you had heard at
9 trial.

10 Now, I can't help that his brother had a --
11 he was a career offender and his record is what his
12 record is. We can't -- in every case, sir, common
13 sense, you can't -- you can't -- just because someone
14 is a career offender and someone is not a career
15 offender, these career offender guidelines are
16 hellacious. You can't bring up every single defendant
17 to equal that person simply because someone is a career
18 offender and someone is not.

19 But, Your Honor, I think it's just really
20 important, and I trust Your Honor and I trust Your
21 Honor's wisdom to be able to put yourself back in May
22 of 2010 and to do the best to put aside --

23 THE COURT: Is that what I need to do is put
24 myself in 2010 and see what the sentence would have
25 been had he pled open? Is that the bottom line?

1 MS. CINQUANTO: Absolutely. Absolutely.
2 Absolutely, because that's where -- Your Honor has
3 found that the 2255 was granted because there was
4 ineffective assistance of counsel based upon the fact
5 that he was not given the correct guideline range.

6 Had he been given the correct guideline
7 range, Mr. Cobb would have pled open, and he would have
8 pled open, you know, way back in the beginning of this
9 case had he gotten the correct advice.

10 And back then he would have a received a sent
11 -- it would have been a five-year mandatory minimum and
12 he would have been looking at approximately, let's just
13 go with the two kilos, sir, 84 to 105 months.

14 THE COURT: Okay.

15 MS. CINQUANTO: And at that point, Your Honor
16 would not have all of the slop of everything that
17 happened post that. And I think that that's a very
18 important place for Your Honor to be.

19 And for Your Honor just to say well, I'm
20 going to raise it up 78 percent just, you know, because
21 that's what I did before, I think Your Honor can -- I
22 think Your Honor, upon reflection, can realize that
23 that's not the reaction or the automatic reaction that
24 maybe Your Honor should have.

25 Maybe Your Honor should think a little bit

1 about where he would have been prior to the trial and
2 prior to everything that Your Honor had heard. And
3 with a man, frankly, who -- frankly, who would have
4 been pled guilty.

5 At the time of sentencing when you gave him
6 78 percent, Your Honor, you had a man who decided that
7 he was going to go to trial, you had the -- you know,
8 this -- you know, he was somebody who was not taking
9 acceptance for his responsibility -- for what he had
10 done. You have a man that, you know, you think, for
11 all intents and purposes, is a drug dealer who's not --
12 who's not sorry. And that would have been a completely
13 different situation had --

14 THE COURT: Okay. So we have -- and this is,
15 as far as I know, maybe the first case that has
16 considered this issue. So it seems to me that there
17 are three steps now. Number one, what is the baseline,
18 and the baseline depends upon whether 851 would have
19 been filed.

20 MS. CINQUANTO: Yes, Your Honor.

21 THE COURT: Once that's established, the
22 second point is what, if any, extent of the variance
23 would have been granted at that time? And then once
24 you get that figure, then number three is what
25 additional information should bear upon this case, such

1 as post-sentence conduct.

2 MS. CINQUANTO: That is correct, Your Honor.

3 THE COURT: Okay. Let me hear from Ms.
4 Marston, please.

5 MS. MARSTON: Your Honor, I disagree with a
6 couple of points that defense counsel has made. I
7 don't necessarily disagree with the three points though
8 that Your Honor has just established there.

9 But, I do think that the idea of that you
10 have to go back and put yourself in 2010 and that you
11 can't take into consideration what happened after that
12 time frame, the case law specifically says, "Second, it
13 is not necessary here to decide as a constitutional
14 rule that the judge is required to pre-sent, that is to
15 say disregard, any information concerning the crime
16 that was discovered after the plea offer was made."

17 So, we don't have a plea offer in this case,
18 but to take defense counsel's timing after the May 2010
19 time frame, you certainly don't have to disregard.
20 That's exactly what Lafler versus Cooper was talking
21 about.

22 The time continuum makes it difficult to
23 restore the defendant and the prosecution to the
24 precise positions that they occupied prior to that
25 rejection of a plea offer is what they're talking about

1 there. But the baseline can be consulted in finding a
2 remedy that does not require the prosecution to incur
3 the expense of conducting a new trial.

4 So, I think obviously to the extent that the
5 Court is going to take into account that he, but for
6 this ineffective assistance of counsel, he would have
7 entered an open plea, he would have come in and I
8 suppose be remorseful for his crimes, get the three
9 level reduction, the Court definitely should consider
10 all of that and be put back in that position, but at
11 the same time, the Court does not have to disregard
12 what the Court learned after that point.

13 That brings me to this 851. My experience is
14 very different than defense counsel's experience. I
15 can speak from my own cases, and I primarily do drug
16 cases. I do not use the 851 as a plea negotiation
17 tactic.

18 If at this point the Holder analysis is
19 correct, we must follow that. If somebody qualifies
20 under the Holder analysis, and I would argue that --
21 and I talked to a supervisor. We've discussed Mr. Cobb
22 under that, he does qualify under the Holder analysis,
23 we would file the 851.

24 Now, in this particular case, I was not the
25 assistant that had the case from the very beginning,

1 but I have reviewed what occurred, and I know that Mr.
2 Leverett said in open court during the hearing what the
3 mandatory minimums would be for Mr. Cobb, and that took
4 into account filing the 851.

5 Now, Mr. Leverett didn't get around to filing
6 that 851 until May, but if defense counsel is arguing
7 that we would have gotten a telephone call and said Mr.
8 Cobb is ready, he's going to plead open, he doesn't
9 want a plea agreement, Mr. Leverett would have known to
10 file the 851 before that hearing took place. That's
11 the argument I made in prior paperwork.

12 If the Court needs to hear from Mr. Leverett
13 or from a supervisor in my office, we can certainly do
14 that. But, this is not a case where the 851 would not
15 have been filed, and it's a case in which from the very
16 beginning, Mr. Cobb was informed of the enhanced
17 penalty that he would be facing when that 851 was
18 filed.

19 Your Honor, obviously this Smart Sentencing
20 Act is something that has not been passed by law. We
21 don't know once it passes whether it be retroactive or
22 not. I think that's something that we really can't
23 take into consideration now.

24 If Mr. Cobb gets resentenced, the Smart
25 Sentencing Act takes into effect, and it is

1 retroactive, well, then we're going to have to deal
2 with it at that point in time.

3 But that's really looking into the future,
4 and we can't necessarily determine what Congress is
5 going to do with that Smart Sentencing Act. So I'm not
6 really going to address that aspect of it.

7 THE COURT: Now, let's go back here for a
8 moment to Mr. Leverett. Is this a question of trying
9 to determine what was inside Mr. Leverett's head, or is
10 it some objective, as opposed to subjective, analysis
11 of those circumstances at the time by looking at the
12 policies and the eligibility of the -- of the defendant
13 for 851 treatment, or do we need to try to sort of
14 penetrate his thought process at the time, and would
15 this depend upon the personality and idiosyncrasy of
16 each prosecutor? I mean --

17 MS. MARSTON: Well, it shouldn't, Your Honor.
18 I can't necessarily say -- obviously, defense counsel
19 has had some very different experiences.

20 THE COURT: Well, that's what I wonder
21 whether ultimate and fair justice can depend upon
22 idiosyncracies and personalities, as opposed to
23 policies and whether the policies were appropriately
24 applied.

25 Obviously, there's discretion. There could

1 be -- some fall on one side and some fall on the other,
2 but whether they were done consistent with policy, as
3 opposed -- I don't know the answer.

4 I'm just -- I'm just throwing this out there
5 because, as I said, we don't have much guidance in this
6 area. At first, I said I would be reluctant to turn it
7 into the idiosyncracies of the judge.

8 In other words, which hopefully, although we
9 all have, you know, tendencies, et cetera, but I don't
10 think it would be sound to say well, we got this judge
11 and, you know, he wouldn't accept this or he would
12 accept that, or we got this prosecutor and, you know,
13 Marston would do it but, you know, Leverett would not
14 do it. How do we sort this out?

15 MS. MARSTON: Well, that's what I'm saying,
16 Your Honor. The policy of the office, especially at
17 that time, was to file 851s. If somebody ---

18 THE COURT: Now, how do we know that? Where
19 is that? Is that in -- is that -- what, written out
20 somewhere or is that --

21 MS. MARSTON: I don't --

22 THE COURT: Custom and practice, is that it?

23 MS. MARSTON: Yes, it's the custom and
24 practice of our office. And at that point in time, it
25 was before the Holder memo came out, so we weren't

1 necessarily doing the analysis now that we have to do
2 we -- the guidance of the Holder --

3 THE COURT: So in a sense, the Holder memo --

4 MS. MARSTON: Gives a different --

5 THE COURT: -- changed --

6 MS. MARSTON: -- set of guidance.

7 THE COURT: There would be no need for the
8 Holder memo if that was already in place. So,
9 obviously, it changed something that was going on
10 before, at least in this office.

11 MS. MARSTON: Well, in all offices.

12 THE COURT: Yes.

13 MS. MARSTON: The Holder memo put it -- I
14 mean there's still an analysis that goes into place for
15 an 851. It goes up to a supervisor, it gets approved.
16 So, now, the Holder analysis is a more detailed
17 analysis that has to go through, given the whole Holder
18 memo.

19 So what I'm trying to say here is at the time
20 that Mr. Leverett had this case, he had made the
21 determination that the 851 was going to be filed and he
22 made that determination from the front end.

23 We know that because we can see the
24 transcript from the detention hearing, or his
25 arraignment. I can't honestly remember exactly which

1 hearing it is, but it's an early hearing in magistrate
2 court where he stated the mandatory minimums that this
3 defendant was going to be facing, and he stated them in
4 terms of the filing of the 851.

5 So that's the government's position, that
6 that 851 was intended to be filed from the very
7 beginning of his case.

8 THE COURT: Okay. Now, what about the upward
9 variance? Let's assume they we get a baseline, whether
10 it is 851 or it's the guideline range, how do we
11 determine what, if any, upward variance should be
12 warranted in this case?

13 MS. MARSTON: Well, I think the Judge -- Your
14 Honor is going to have to take a position that what I
15 just quoted from the case law here, obviously we don't
16 disregard everything we learned after the fact.

17 The fact of the matter is at any sentencing
18 hearing, everybody, at the time of Mr. Cobb's trial and
19 even until the presentence report came out, was under
20 the impression that he also, like his brother, was
21 going to be a career offender.

22 Whether or not he had pled open or whether or
23 not he had gone to trial and then was going to have a
24 sentencing date, that would have been a matter that the
25 government would have addressed with the Court.

1 The argument that the government says is that
2 the government would have filed -- would have made a
3 motion to the Court. We expected him to be a career
4 offender. We have learned that he is not going to be a
5 career offender and this is why, but the Court should
6 take into consideration exactly what the government did
7 present at his sentencing hearing. That would have
8 happened whether or not he went to trial or whether it
9 was an open plea.

10 THE COURT: It would have been relevant
11 conduct, is that it?

12 MS. MARSTON: It would have been relevant.
13 Oh, definitely, Your Honor. Now, I also want to point
14 out that part of the Court's reasoning for the upward
15 variance, granting the upward variance and then doing
16 the 78 percent that the Court did was because the Court
17 determined that Jonathan Cobb was more culpable than
18 his brother, David Cobb. So taking away the --

19 THE COURT: Well, now, counsel says that had
20 he pled guilty, that might not have been -- come out,
21 but what you're saying is it would have come out at the
22 sentencing hearing?

23 MS. MARSTON: Oh, definitely it would come
24 out at his sentencing hearing because obviously the
25 government is going to present the facts related to

1 this particular case, and when you have co-defendants
2 the government is definitely going to address to the
3 Court who is more culpable, who is less culpable, who
4 did what. So that definitely would be presented.

5 That's also my argument, we haven't focused
6 too much on this, between the one kilogram and the two
7 kilogram, but that evidence would have also been
8 presented.

9 It's not like the government is going to
10 forget about a kilogram of cocaine just because
11 somebody enters an open plea. That's relevant conduct
12 that we must present to the Court for the Court's
13 consideration. So, I have no problem with this three
14 step method. The baseline --

15 THE COURT: Now, is this going to be a full
16 sentencing or just simply --

17 MS. MARSTON: I don't --

18 THE COURT: -- grant the motion or deny the
19 motion? What do I -- do I grant the motion to reduce
20 the sentence, is that going to take care of it or do I
21 have to have a full sentencing?

22 MS. MARSTON: I don't believe you have to
23 have a full sentencing, but obviously I don't oppose
24 defense counsel presenting you, and I will make -- I
25 just learned this morning that she wants me to make a

1 telephone call to --

2 THE COURT: Right.

3 MS. MARSTON: -- counselor, which I am happy
4 to do. If I'm provided the information, I'll do it
5 today. But, obviously, the government doesn't
6 oppose the Court taking into consideration any
7 post-rehabilitation. I don't think this has to be a
8 full sentencing hearing but, you know, I leave that up
9 to the Court's discretion.

10 THE COURT: I think I had one case where the
11 sentence was reduced, and I think we did it right from
12 the sentence. Before the Lafler case came out, and
13 perhaps to the surprise of many of us, actually, the
14 Third Circuit had a case, and the name escapes me, but
15 Judge Fisher had authored a case which pretty much
16 required what Lafler does today.

17 And pursuant to that, we had a -- we had a
18 hearing, the sentence was reduced, but I don't believe
19 we had a full sentencing, which doesn't mean that might
20 have been correct. What's your view of that? Do you
21 want a full sentencing from beginning to end or do we
22 just focus on the issues that we have raised here
23 today?

24 MS. CINQUANTO: Your Honor, may I -- may I
25 just --

1 THE COURT: Yes.

2 MS. CINQUANTO: -- respond to a couple of
3 things --

4 THE COURT: Right.

5 MS. CINQUANTO: -- before I answer that
6 question? Okay, because there's a couple of
7 inaccuracies here.

8 Number one, okay, absolutely, the government
9 is asking you to presume what Neuman Leverett would
10 have done. And they're pointing to a detention hearing
11 where they said oh, you know, the 851 could be filed
12 because -- they actually don't mention the 851 in the
13 detention hearing. They only mention the mandatory
14 minimums.

15 At a detention hearing, of which I have done
16 many --

17 THE COURT: But wasn't that the same -- isn't
18 that the same thing?

19 MS. CINQUANTO: Well --

20 THE COURT: In other words, the mandatory
21 minimum could only have gone up if 851 was filed?

22 MS. CINQUANTO: Yes, Your Honor. However, in
23 the detention hearing, they also said he's a career
24 offender.

25 THE COURT: Okay.

1 MS. CINQUANTO: Okay. So Neuman Leverett, at
2 the time of the detention hearing, thought this man was
3 a career offender, and the representations he made to
4 the detention hearing was inaccurate, and what he put
5 in that motion may have been inaccurate based upon his
6 misbelief or his misunderstanding he was a career
7 offender.

8 So yes, of course, they're asking you to get
9 into Neuman Leverett's head and decide whether or not
10 the mane would have filed an 851 --

11 THE COURT: We should or we shouldn't?

12 MS. CINQUANTO: Excuse me?

13 THE COURT: We should or shouldn't?

14 MS. CINQUANTO: We should not --

15 THE COURT: Okay.

16 MS. CINQUANTO: -- but they're asking you to.
17 But now what do you have to do, Your Honor? You have
18 to do what every good lawyer does in a situation like
19 this. Look at the circumstantial evidence, okay, the
20 circumstantial evidence about whether this man would
21 have filed an 851.

22 We talk about Attorney General Holder's memo,
23 and it's my mistake because I should have put this on
24 my timeline. Attorney General Holder's memo came out
25 on May 19th, 2010. The 851 was filed on May 24th,

1 2010.

2 So Attorney General Holder's memo was in
3 place at the time Neuman Leverett filed that 851. So
4 Neuman Leverett filed that 851 because this man had
5 opted to go to trial and it was part of a negotiation
6 tactic, and that's what happened.

7 The U.S. Attorney's Office was under clear
8 direction at the time that Neuman Leverett filed that
9 on May 24th, 2010, that these 851s should not be
10 filed without an individualized analysis of every
11 defendant.

12 The government said in their own brief, and
13 even here in its argument today, that it is a matter of
14 course that they file an 851. They violated their own
15 Department of Justice regulations. And if that's
16 really what was happening with the U.S. Attorney's
17 Office and they are really going on record under oath
18 and say -- not under oath, but as an officer of the
19 court in saying these things, we have a lot bigger
20 problem than just Mr. Cobb, because what they're saying
21 on the record is that, as a matter of course, on May
22 24th, 2010, they are filing 851s when they were under
23 clear direction on May 19th that they can't do that.

24 So we have a lot more problems, Your Honor,
25 than Mr. Cobb. I'm not finished yet, okay? That's the

1 first thing. So, circumstantially, Your Honor, I'm
2 asking you -- I'm asking you --

3 THE COURT: Ms. Marston.

4 MS. CINQUANTO: I'm asking you to look at the
5 circumstantial evidence. We have an attorney general
6 file that says you cannot do this on May 19th, we have
7 filed on May 24th when this man at that point has opted
8 to go to trial. That's why the 851 was filed.

9 The detention hearing, we can't even rely on
10 that as circumstantial evidence because Neuman Leverett
11 was wrong at the detention hearing about him being a
12 career offender. So if he was wrong about that, he was
13 wrong about the mandatory minimums. Who knows? But
14 the point is, Your Honor, is that we're -- I'm just
15 asking for what's fair. And I know in my experience
16 that 851s are not filed --

17 THE COURT: Okay, fine, you said that before.

18 MS. CINQUANTO: All right.

19 THE COURT: Maybe we --

20 MS. CINQUANTO: The second --

21 THE COURT: Maybe we --

22 MS. CINQUANTO: May I?

23 THE COURT: -- ought to have him come in and
24 testify, and then depending upon how that turns out, I
25 will decide whether or not that subjective analysis was

1 proper.

2 But maybe that should be on the record for
3 review purposes to have Mr. Leverett come in and
4 testify as to what the sequence of events and be
5 cross-examined at that point. What do you think? You
6 said you had no problem with that.

7 MS. MARSTON: Well, let me just respond.

8 THE COURT: Is he still in the office?

9 MS. MARSTON: He's not still in the office.

10 THE COURT: Where is he?

11 MS. MARSTON: Private practice in New Jersey
12 I believe.

13 THE COURT: Okay.

14 MS. CINQUANTO: I'm sure they can subpoena
15 him.

16 THE COURT: What, I'm sorry?

17 MS. CINQUANTO: I'm sure they can subpoena
18 him, Your Honor.

19 MS. MARSTON: He can certainly --

20 THE COURT: Oh, I'm sure he'll --

21 MS. MARSTON: -- be here if he is needed to
22 be here.

23 THE COURT: Yes, I'm sure he'll show up.

24 Yes.

25 MS. MARSTON: I really do take offense though

1 that -- what I am saying, a matter of course, means you
2 take into account whatever policy is in place at that
3 time.

4 THE COURT: Now, do you -- you may not know
5 the answer to this question, but do you know, first of
6 all, the timeline that counsel has now laid out? Do
7 you know whether Mr. Leverett went through or the
8 office went through the Holder memo analysis?

9 MS. MARSTON: I will have --

10 THE COURT: Yes.

11 MS. MARSTON: -- to check with a supervisor,
12 but my knowing Mr. --

13 THE COURT: Who is the supervisor? Who was
14 the --

15 MS. MARSTON: I believe it would have been
16 Faith Taylor --

17 THE COURT: At the time?

18 MS. MARSTON: -- at the time of this
19 particular case.

20 THE COURT: Okay.

21 MS. MARSTON: It's either Tom Perricone or
22 it's Faith Taylor, and I will check on that. But I
23 know -- I mean knowing Mr. Leverett and that memo
24 coming down, and as soon as that memo came down, it was
25 sent to us. And if you're filing an 851 within days of

1 that memo --

2 THE COURT: Okay, well, we'll see.

3 MS. MARSTON: -- you would go through that
4 policy.

5 THE COURT: Okay. Well --

6 MS. MARSTON: And so I just want it to be on
7 the record though because I feel like I'm getting
8 accused here of --

9 THE COURT: Yes.

10 MS. MARSTON: -- doing some things that --
11 when I say as a matter of course I mean whatever policy
12 is in effect at that time. If somebody fits under that
13 analysis, the 851 is filed. Just like today, we go
14 through the Holder analysis, if the Holder analysis
15 says an 851 gets filed --

16 THE COURT: Is this done in writing or is it
17 done orally with a supervisor?

18 MS. MARSTON: It can be done either way
19 depending on --

20 THE COURT: Okay.

21 MS. MARSTON: I mean if you're sitting down
22 talking to a supervisor, you go through the analysis
23 and you get their approval. I mean it just depends on
24 the case and the situation.

25 THE COURT: And what is the timing for

1 deciding whether or not to file an 851? Is there some
2 office procedure that we should be -- file out front or
3 later or it depends or how does that work?

4 MS. MARSTON: Your Honor, that does depend a
5 little bit on the A.U.S.A. I personally tend to file
6 them on the front end of the case and I do my analysis
7 on the front end of the case with the supervisors.

8 But I do know, and I know that in my previous
9 motions that I filed with you, there was a
10 circumstance, and I think I quoted to that case that
11 actually Tom Perricone was on the stand in a case with
12 a former A.U.S.A Kenya Mann where she hadn't filed the
13 851 until right before trial.

14 And it was a similar circumstance where Mr.
15 Perricone took the stand to say that it would have been
16 filed. This wasn't something -- and I forget all of
17 the circumstances of that particular case, but I do
18 know that it was something that he had to testify that
19 as a supervisor, that was something that was going to
20 be filed.

21 THE COURT: Okay.

22 MS. CINQUANTO: Your Honor, what I would
23 request, Your Honor, if Your Honor is going to have a
24 hearing with Mr. Leverett, I would request the file. I
25 would request all written procedures, memorandum, and

1 any type of advice that is given to the U.S. Attorneys
2 regarding filing an 851, all written procedures and any
3 type of memos or e-mails that are sent regarding that.

4 I would like all correspondence from Mr.
5 Leverett to his supervisor regarding this particular
6 case. I would also like Mr. Leverett's supervisor
7 present to discuss what type of conversations that they
8 had. So we're not going to sit --

9 MS. MARSTON: That's work product.

10 THE COURT: Okay. Hold on a minute.

11 MS. CINQUANTO: It is not work product --

12 THE COURT: Hold it.

13 MS. CINQUANTO: -- because at this point,
14 Your Honor, at this point, Your Honor, they are opening
15 the door to say well, Mr. Leverett is going to come in
16 and take the stand.

17 I'm entitled to any type of paperwork or
18 anything having to do with his decision if he
19 testifies that he would have filed the 851. And I
20 would like that information because it is --

21 THE COURT: Well, why don't you --

22 MS. CINQUANTO: -- important.

23 THE COURT: Why don't you make a request?

24 MS. CINQUANTO: I will, Your Honor.

25 THE COURT: And then we'll see what the

1 government's response is and we will do that. I think
2 what we're going to do is the following. We'll adjourn
3 and we'll set an evidentiary hearing in this case, at
4 which point Mr. Leverett will be requested, and he -- I
5 don't believe you need to subpoena him, but it may be
6 necessary. He may want to be subpoenaed for all we
7 know.

8 So, Ms. Marston, why don't you make contact
9 with him and advise counsel whether Mr. Leverett is
10 going to appear voluntarily or whether he needs to be
11 subpoenaed? As I said, I think that he may want to be
12 subpoenaed just simply because he's in private practice
13 and I don't know. If I were him --

14 MS. MARSTON: I will find out.

15 THE COURT: -- I would probably want to have
16 that. So we will do that and then there will be a --
17 the defendants may serve a request for production of
18 documents, and the government will then respond to it
19 appropriately, and if there is an issue, then we'll try
20 to sort that out.

21 Now, in order for all of that to take place,
22 why don't we allow them 60 days to do that? But let's
23 have -- 30 days from now, we'll have a telephone
24 conference with counsel to see where we are, to see
25 whether we got Mr. Leverett.

1 Number two, whether we got any issues with
2 the documents. We can do that on the telephone
3 initially, okay? And then the hearing is continued for
4 60 -- approximately 60 days from today. Okay.
5 Anything else, Ms. Marston?

6 MS. MARSTON: No, Your Honor.

7 THE COURT: Ms. Cinquanto?

8 MS. MARSTON: Thank you.

9 MS. CINQUANTO: No, Your Honor. Thank you,
10 very much.

11 THE COURT: Okay. Very well. Thank you.
12 Hearing is adjourned.

13 MS. CINQUANTO: Your Honor, is -- I'm so
14 sorry, sir. Should Mr. Cobb remain locally during this
15 time period?

16 THE COURT: Well, that's up to the marshals,
17 but it would probably be a good idea since he's going
18 to be needed here. Where is he normally?

19 THE MARSHAL: He's in Fort -- he's at Fort
20 Dix.

21 THE COURT: Okay. Well --

22 THE MARSHAL: We have a writ out for him now,
23 but the writ will say that he is to go back after this
24 hearing. So I can just do an order just to have him
25 remain here.

1 THE COURT: Yes, why don't we keep him here
2 so he'll be available? Okay. So we will do an order
3 today.

4 MS. CINQUANTO: All right, thank you, Your
5 Honor.

6 THE DEFENDANT: Thank you.

7 THE MARSHAL: All right.

8 (Proceedings adjourned, 9:59 a.m.)

9 * * *

CERTIFICATION

I, Donna Anders, do hereby certify that the foregoing is a true and correct transcript from the electronic sound recordings of the proceedings in the above-captioned matter.

12/27/15
Date

Donna Anders
Donna Anders